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THE STRENGTH AND WEAKNESS OF POPULAR
GOVERNMENT IN THE UNITED STATES.

AN ADDRESS

DELIVERED BEFORE THE GRADUATING CLASSES

AT THE

SIXTY-SIXTH ANNIVERSARY

OF

YALE LAW SCHOOL,

ON

June 24, 1890.

BY

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*on
Lectures on Lynching*

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Mr. President and Gentlemen of the Graduating Classes :

The fourteenth Amendment to the Constitution of the United States provides that “* * * when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of the State or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” To whatever exigencies of the time its enactment may have been immediately due, this provision expresses a principle which is every day more and more generally and practically recognized in our political ethics, although to our great-grandfathers it would have appeared equally unreasonable and unjust. We are not yet prepared to say that the right to participate in government shall not be limited by sex; it seems scarcely possible that we shall ever say that this shall not in some degree depend upon

age, or that it may not be forfeited by crime ; but any other distinction in this regard between citizens is for us an anomaly, and *prima facie* oppressive. By the letter of the law a State which disfranchises idiots or lunatics or tramps not actually convicted of vagrancy, should suffer a corresponding diminution in its representation, and, if such a result is improbable, this arises from the facts that the first two classes of the community seldom claim political privileges, while the last, like the well known little pig of fable, "won't stay still long enough to be counted." We do not admit that a man's intelligence or education, habits, reputation or means can appreciably affect his fitness to exercise political power. If he is a male of the species *homo sapiens*, has completed the twenty-first year of a life honorable or shameful, useful or useless or worse than useless, and has escaped, by whatsoever means, a successful criminal prosecution, then the difference between his qualities as a ruler and the qualities of a Pericles or Hampden or Washington, becomes one of those least things whereof the law takes no account.

Founded upon this principle we have "a government of the people, by the people and," in theory, "for the people." I do not intend to discuss its abstract merits or shortcomings, but propose to consider very briefly how far certain salient characteristics of our polity are to be attributed more or less directly to our popular government ; and I ask your indulgence to this end with the less hesitation because I believe that some enlightened and

fair-minded critics of our institutions misunderstand the influence exerted on these by the progressive dilution of our electorate during the past hundred years. Doubtless much that is typically "American" is so because America furnishes the most striking, if not the only, example in modern times of a pure democracy in permanent control of a great nation, yet American democracy is too often credited with results, whether for good or ill, which are in nowise its fruit and which it may even tend to minimize or remove.

I would first note that our form of government has nothing to do, either as a hindrance or as a help, with two of the greatest blessings enjoyed by the American people. Compulsory military service is unknown here and war very improbable, not because we have no king and no nobility, but because we have no neighbors, or at least, none who, according to any human foresight, can grow into rivals. There is room here for everybody, not because everybody has a vote, but because land is so plenty and men are, as yet, so few. I have indeed seen the statement that republics, and more particularly democratic republics, are essentially unwarlike, but speaking where I am and to the hearers I see before me, I may assume that this extraordinary misreading of history needs no correction. When, a quarter of a century since, the people of these United States had to decide the momentous question whether in North America there should be one great power, or more than one, they decided it once for all.

No Roman senator or citizen echoed Cato's warning more heartily than they when they said "*delenda est*" of any possible competitor for supremacy on the continent. They decided then, and decided wisely, that any war, however bloody, any waste, however lavish, of life and treasure and human suffering must be borne, if needful, that they and their children should have forever a world to themselves. And of their sacrifices we reap the just fruit; we are not perpetually thinking about fighting and getting ready to fight, only because when our fathers had fighting to do they fought to a finish. To their foresight and resolution we owe an immense debt of happiness, but democracy did not make them thus resolute and far-seeing. Other governments of widely different constitution, that of Rome contending with Hannibal, that of England, in the first years of this century, have dealt as firmly and as providentially with like problems, and received a support as cordial and unwavering from the peoples they ruled. Still less has our popular government put so many square leagues of fertile land between the Atlantic and the Pacific, the Rio Grande and the Great Lakes, and with these the life-giving forces furnished to our body politic by this vast area for untrammelled growth. It has been well said that an immense store of moral energy has gone into the material development of the country, but in such a task this energy is exercised, not exhausted. As a smith's arm grows the stronger with every blow he deals, so every new province reclaimed from weeds and

wild beasts and wandering savages, has served to purify and invigorate the older communities, whose children did the work. Mischief, as we all know, is supplied to order and in unlimited quantities by an ever watchful provider for idle hands, but in our country there are no idle hands, except those too puny and nerveless to do a man's work in mischief or anything else. Our two leisured classes, club men and tramps, if always useless and sometimes annoying, are in nowise dangerous, and we can turn potential nihilists into pioneers. But democracy is not the cause of all this; men are not fitted to be pioneers by the privileges of voters, although they are fitted to be voters by the training of pioneers. Our system of internal colonization owes little or nothing of its success to our system of popular government, although our popular government may, perhaps, owe much to our internal colonization.

To form an intelligent judgment regarding any government, we should consider, first, its scope, then its means of action and, lastly, its efficiency and economy, or, in other words, what work is given it to do, how it is equipped to do this work, and how thoroughly or imperfectly, and at what cost is the work in fact done. One of the most marked characteristics of our polity is the limited scope of governmental action. We ask and permit our rulers to do only such work as no one else can do for us; or, if this statement is a little too sweeping, we require clear proof that they can do it better than it will otherwise be done before entrusting it to them. In case

of any doubt, the presumption is in favor of private agencies; *prima facie* the State's intervention is an evil, and the *onus probandi* rests always on its advocates. The consequences of this fixed mental attitude in the American people are far-reaching and, in my opinion, profoundly salutary. To cite but a single illustration, it is because and only because we strive to make the State's duties as few and as easy as possible, that we have perfect religious liberty, and yet wellnigh all the political advantages which flow from a legal sanction to religious influences. This aspect of our national life is peculiarly puzzling to a foreigner. He is told that in America, the law knows nothing of religion and treats all churches just as it treats base-ball clubs; yet on Sunday he finds the daily habits of the people seriously modified by law in deference to religious opinions; he sees the proceedings of most legislative bodies opened by a religious service, may hear a Court reject a witness' testimony for want of religious belief, on grounds which would render not a few among the statesmen of Continental Europe avowedly incompetent, and learns that in almost every State, Church buildings are exempted from taxation, and clergymen from militia service or jury duty. It is hardly surprising if he does not readily understand this, and yet the explanation is very simple. We are, in fact, essentially a religious people, but we do not deem the civil government competent to determine the comparative merits of different faiths. That function is reserved to the individual citizen,

and wherever public opinion ceases to be practically unanimous as to questions of belief or morals, the State's province ends.

Our civil rulers are not anointed of the Lord ; their oath of office has no quasi-sacramental efficacy to make them providential leaders in the paths of salvation ; their concern is with the things of Cæsar, and we have no wish that they should meddle with what concerns them not. And as we forbid the State to become a Church, so we forbid, or at least discourage its undertaking any business to which anybody else can and will attend. Advocates of communistic experiments among us are men who have not yet become, who, for the most part, never will become Americans ; for the mass of our people their visions of Utopia are unattractive and well nigh unintelligible ; an omniscient and omnipotent government, making everybody happy according to rule, is to Americans not only a dream but a nightmare.

But is this self-helpfulness due to democracy ? Do we limit the province of the Government thus strictly, because in that government all of us share ? Are we, in short, so free because we are so nearly equal before the Law ? These questions are answered if we remember that freedom is our heritage, equality we have made for ourselves. Our forefathers had been free from time whereof the memory of man ran not to the contrary before the Declaration of Independence proclaimed all other

men of right their equals; we have grown no more, if not less, free, since the fourteenth and fifteenth amendments have given their logical effect to these words. The doctrine that, presumptively a man can take better care of himself than the State can take of him, came to America with the tongue and the laws of our Mother country; in asserting it, we say as truly as did the parliament of Merton, *Nolumus leges Angliæ mutare*. Indeed, to my mind, the gravest problem of our future is whether individual liberty, as we know it, can permanently co-exist with popular government; whether it is possible to make or keep men equal without abridging their freedom, as a trade-union prevents one workman from over-topping his fellows only by dwarfing all alike.

Habeas Corpus and the Dartmouth College decision have tempered and elevated American democracy, but, except for an optimist, it is an open question whether, even in America, there can be long a democracy of freemen.

Such, however, is the government we now have, and whatever may be its future dangers or present shortcomings, it has at least the undoubted merit of irresistible strength. We jealously narrow its sphere of action, but within that sphere we permit no resistance to its will. Public opinion in the United States is thoroughly sound and healthy when dealing with law-breakers; we have our full share of those old ladies of both sexes whose reasoning faculties are located in their lachrymal glands,

but nowhere to my knowledge is the national conscience less confused by that morbid shrinking from the use of physical force against evil doers which is a moral malady of the age. We hardly understand why the English should hesitate to give their policemen firearms; "need a body cry" if an officer's revolver does now and then save our Courts the trouble of trying a burglar, and cut off his chance of "burgling" again when released or escaped from prison? We think of such a catastrophe as Louis XVIII thought of Lord Byron's death: "*C'est un mauvais sujet de moins; voila tout.*" Nor have we any of the tenderness for turbulent or disaffected people which springs, more or less consciously, from a belief or suspicion that, however wrong-headed these may be as to their remedies, their discontent is due to real grievances. We feel that where every citizen has his share in making the laws, those claim more than their share who ask the privilege of breaking them; that a minority which refuses obedience attempts usurpation. And, as the law is made by all, it is the business of all to aid in its enforcement. It is not the King's peace, but the people's peace which here is broken by crime, and so it is not the King's concern, but the concern of the whole community to guard against or punish the breach. The sense of this solidarity among all citizens is illustrated, a little paradoxically perhaps, but nevertheless conspicuously by our much mis-judged custom of lynching. I do not deny that this summary system of criminal procedure has very seri-

ous drawbacks, but I believe its advantages are generally underestimated and its theory is too often misunderstood. Sir Henry Maine has pointed out that in a primitive society the growth of Criminal Law is retarded by the very distinctness with which the conception of crime as a wrong to the community is realized. At first the State deals with its internal as with its external enemies by the immediate exercise of its military strength, and every sentence is less a judgment than a bill of attainder. It is only when the State has come to mean rather an abstract entity than you and me and all of us, or when it has been personified in some individual sovereign, that the question whether a prisoner is guilty of any offence against society becomes over-shadowed by the question whether he can be convicted of the particular charge against him under the law and the evidence, and a criminal proceeding is converted from a vindication of the community's safety and dignity into a trial of skill between the government and the traverser, adapted especially to determine whether the latter has committed the Spartan's unpardonable fault of being found out. Now lynching is caused by a revival of the primitively vivid conception of crime as a wrong to society, to society viewed, not as a creation of the mind, but as simply an aggregate of its members; some of these members know or believe that they (together with all others) have been so wronged; they only see to it that the wrong receives its appropriate punishment. In so doing they themselves take some liberties

with the law, but they may remind a harsh critic of the king who fell overboard and was allowed to drown by too-respectful sailors because they feared to profane his sacred person in handling it. In practice the system is unquestionably liable to abuse. Judge Lynch may make mistakes, and his mistakes can be corrected by no writ of error, but if the number of failures of justice in his Court could be compared with those in our more regular tribunals, I am not sure that he need fear the result. I believe that very few innocent men are lynched, and, of those who have not committed the particular offence for which they suffer, a still smaller proportion are desirable members of society. It is, of course, an evil that the law should be occasionally enforced by lawless means, but it is, in my opinion, a greater evil that it should be habitually duped and evaded by means formally lawful. A few defaulting State treasurers or "boodle" aldermen hanging untried to lamp-posts might not be an edifying spectacle, but it would have a more wholesome effect on public officials than a long series of quashed indictments, disagreeing juries, forfeited "straw" recognizances and varying phases of legal impunity for prosperous scoundrelism.

In truth, lynching is an attempt to supply within the unquestioned province of the government the government's equally unquestioned deficiency, and its practice constitutes a grave and disquieting symptom of the evil it seeks to remedy. If popular government does not so administer justice as to satisfy the moral sense of the

people, then popular government fails to fulfill its duty. A government, like every other contrivance of man or production of nature, must be judged by its fruits. The worth of American democracy will be gauged by our answers to two questions, namely:—To what manner of men does it entrust political power? And how well or ill do these men exercise that power? These questions involve comparisons, and comparisons are proverbially odious, because seldom fair, but I shall not test the merits of our rulers and of their rule by any foreign standards. I ask you to measure the leaders of the thoroughly democratic America of to-day by the leaders of the far less democratic America of a century since, and the management of our public affairs by the management of our great industrial and educational enterprises. A year ago the highest officers of the Union were welcomed by those of our greatest State and greatest City in celebrating the Centennial anniversary of our first President's assumption of office: how looked these men and all the other dignitaries around them when shadowed by the memories of those who had a hundred years before accompanied or greeted Washington?

Yale and Harvard are ruled by oligarchies; the Pennsylvania Railroad and the New York Central are plutocracies; are these corporations managed with greater or with less fidelity, skill and success than are shown in the administration of, for example, the City or the State of New York? And how, think you? Would the univer-

sities be better governed, or worse, if every citizen, learned or ignorant, of New Haven or Cambridge, had, by right of birth or residence, a voice in their affairs? Would the railroads be more or less prosperous if the stockholders had to share their control with all the brakemen and switch-tenders in their employ, or all the passengers and shippers who use them? In brief, is it true that as a ruler on any field or for any end *πολύ τε διαφέρειν οὐ δεῖ νομιζειν ἄνθρωπον ἄνθρώπου?*

It is not true; it is not really believed to be true by any thinking man; and from its assumption of set purpose as a postulate in any scheme of government there will flow all the baleful consequences of a deliberately acted lie. We have not escaped the penalty, but it is the lighter for us because we have been half-hearted in the sin; we indeed set up a popular government, but we give that government the least possible to do, and when its inefficiency becomes dangerous we help it out with even this trifling work. We get along with so little ruling that we can in some measure afford to be careless as to the quality of our rulers; our resources are so boundless, the work of their development is so absorbing, our national life is so overflowing with energy and health, that we will not lose the time we can ill spare "o'er petty quarrels upon petty things" among the petty men we endure as politicians. In the exuberance of our youthful strength, we think we can neglect little ailments, formidable perhaps to those without our immense advantages. But a day of

reckoning awaits this heedlessness. We cannot, with impunity, dismiss from thought the character and conduct of our public men, although we may be rich enough to bear any degree of mismanagement and profusion. Corruption creeps surely into an ill-regulated national family, and it is no less true now than when Burke spoke that "there never was *long* a corrupt government of a virtuous people." To-day Americans confront the problem whether they shall purify their government or their government shall debase them.

We shall purify our government and the universities of America must lead in the work. We need an aristocracy in the true and original, not the technical and perverted, sense of the word; a government by the men best fitted to govern; it is for Yale and her sisters to supply such men. You, gentlemen of the Faculty of this old and honored seat of learning, you do less than your part if any youth leaves your walls believing that he owes no greater debt to his country than if they had never sheltered him. I call on you to teach those for whose after lives you must so largely answer that the post and the work of each citizen in the commonwealth are fixed for him by no Procrustean standard of legal uniformity, but by his faculties and his blessings; that when God gives him light and strength to wield power for the good of his fellow men, He gives with them the right to claim and the duty to seek such power. Teach them to reject in word and action a mischievous sophism, so shallow that to clearly state is

to expose it, but which, repeated parrot-like by thousands who recognize its emptiness, has maimed and distorted our conception of civic duty. Teach them to see, not that men are essentially and by nature unequal, for of that only the blind could fail, but that it is unworthy of a good and brave man to shut his eyes to what is. In short, teach them, in this, as in every other, field of thought, to know and tell and act the truth, and this truth shall make them, and others through them, truly and worthily free!

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